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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Redacted Version
with Confidential Prosecution, Defence and Legal Representatives only Annexes 1 –
4B and Confidential ex parte Annex 5

Prosecution's Provision of Information on the witnesses dealing with the abuse of
process and intermediaries

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. As instructed, the Prosecution hereby provides information in respect of intermediaries DRC-OTP-WWWW-0316 ('intermediary 316'), DRC-OTP-WWWW-0321 ('intermediary 321')¹ and the representatives of the Office of the Prosecutor (OTP) that the Trial Chamber ordered the Prosecution to call in its Decision on Intermediaries, and the additional witnesses that the Prosecution seeks leave to call relevant to the Defence abuse of process motion.²
2. Copies of relevant statements in the Prosecution's possession are annexed to this filing. Statements already taken have been disclosed to the Defence.³ As regards the witnesses for whom statements have not yet been taken, the Prosecution is endeavouring to conduct interviews and prepare statements as soon as possible. They will be disclosed forthwith upon completion.
3. The Prosecution has identified the OTP representatives that were most closely involved in the recruitment and managing of intermediaries 316 and 321 at the relevant times and are therefore in the best position to provide comprehensive evidence on the allegations put forth by the Defence. They are being called to address specific and particular points regarding the intermediaries who were implicated by the Defence witnesses relevant to the abuse of process claim. It is the Prosecution's contention that the scope of questioning of these witnesses should be limited accordingly.
4. For all witnesses concerned with the allegations that intermediaries contributed to an abuse of process, the Prosecution intends to elicit in

¹ The Prosecution notes that whilst 316 was a formal intermediary, 321 was a facilitator on an ad hoc basis, [REDACTED]. After that 321 did not provide further assistance to the office as a facilitator.

² The Prosecution has already provided a schedule of proposed witnesses including details of their anticipated evidence and possible dates of testimony. In emails from the Legal Officer to the Prosecution on 8 June 2010 at 13:23hrs and 16:27hrs (copied to the Defence and Legal Representatives of Victims), the Trial Chamber reiterated that the Defence required sufficiently comprehensive information on the expected evidence of each of the additional witnesses dealing with intermediaries and the abuse of process, and that in this regard the Prosecution was to file all relevant statements (or, in the case of witnesses for whom statements are not yet available, to secure those statements and file copies as soon as possible).

³ Excluding DRC-OTP-0228-0023, the statement of witness DRC-OTP-WWWW-0555 (attached as Confidential Ex Parte Annex 5). This will be disclosed as soon as the witness's individual security situation has been properly addressed.

evidence the information contained in their statements which is directly relevant to the contested issues.

5. Furthermore, following on from submissions made on 3 June 2010,⁴ the Prosecution requests that the Chamber order the Defence to call “Cordo” to testify prior to the submissions regarding the alleged abuse of process, or in the alternative that the Chamber itself call Cordo as a court witness. Given the evidence that has emerged in this case, it should be beyond dispute that the evidence of Cordo is “necessary for the determination of the truth” within the terms of Article 69(3).
6. Finally, as indicated during the hearing on 3 June 2010, the Prosecution reserves its right to seek leave to call additional witnesses and/or withdraw scheduled witnesses if, after further investigation and consideration, this is deemed appropriate.⁵

Submissions

INTERMEDIARIES 316 AND 321

7. The Trial Chamber ordered the Prosecution to call intermediaries 316 and 321 as witnesses in its Decision on Intermediaries.⁶ Intermediary 316 was interviewed by the Prosecution on 6-7 October 2009. The transcripts of this interview were disclosed to the Defence on 17 November 2009⁷ and are attached as Confidential Annex 1. Intermediary 321 was interviewed by the Prosecution on 29 October 2009 and 21-22 January 2010. The transcripts of these interviews were disclosed to the Defence on (respectively) 26 January 2010⁸ and 9 February 2010⁹ and are attached as Confidential Annexes 2A and

⁴ ICC-01/04-01/06-T-298-ENG ET, page 15, line 16 to page 16, line 1.

⁵ See transcript of the hearing on 3 June 2010; ICC-01/04-01/06-T-298-ENG ET at pages 16, 21.

⁶ ICC-01/04-01/06-2434-Red, para. 150(iii).

⁷ Four of the 10 transcripts were initially disclosed with redactions made pursuant to Article 54(3)(e) and Rule 81(2). These redactions were subsequently lifted and the Defence received fully unredacted versions of the four transcripts on 8 June 2010.

⁸ Five of the seven transcripts of intermediary 321’s October 2009 interview were disclosed with Rule 81(2) and Rule 81(4) redactions. The Prosecution requested authorisation for these redactions in the “Prosecution’s

2B. Additionally, the Prosecution conducted an interview with intermediary 321 on 8-9 June 2010 and disclosed the recordings of this interview to the Defence on 9 June 2010. Once the transcripts are finalised, these will be disclosed to the Defence and filed.

8. Intermediary 316 is expected to testify about his work for the Prosecution in facilitating contact with witnesses. He will respond to allegations that he assisted in falsifying evidence.
9. Intermediary 321 is also expected to testify about his work for the Prosecution in facilitating contact with several former child soldier witnesses. He will respond to allegations of wrongdoing in relation to his interaction with the former child soldiers.

OTP REPRESENTATIVES

10. With respect to the OTP representatives, and pursuant to the Chamber's instructions,¹⁰ the Prosecution has identified three individuals to testify on discrete and specific issues related to the abuse of process and intermediaries 143, 316 and 321.
11. [REDACTED], DRC-OTP-WWWW-0582, is being called to speak on his specific dealings with intermediary 316. He may also give evidence on general matters related to the use and management of intermediaries at the relevant time. He is not being called to speak on matters related to intermediary 321 or matters related to the former child soldiers and other trial witnesses whose testimony has not been alleged to be tainted by the purported abuse of process.

Request for Non-Disclosure of Information in Documents related to Defence Witnesses and Re-Interviews with Prosecution Witnesses"; ICC-01/04-01/06-2314-Red. A decision on this request is pending.

⁹ The recorded tapes of interview of intermediary 321's January 2010 interview were disclosed earlier, on 26 January 2010. The three transcripts of this interview were disclosed with redactions made pursuant to Rule 81(4). The Prosecution requested authorisation for these redactions in the "Prosecution's Request for Non-Disclosure of Information in Documents related to Defence Witnesses and Re-Interviews with Prosecution Witnesses"; ICC-01/04-01/06-2314-Red. A decision on this request is pending.

¹⁰ See email from Legal Officer to the Chamber on 26 May 2010, 15:52hrs. The Prosecution was ordered by the Trial Chamber to call an appropriate representative as a witness in its Decision on Intermediaries; ICC-01/04-01/06-2434-Red, para. 150(iv).

12. [REDACTED], DRC-OTP-WWWW-0583, is being called to provide general evidence related to the use of intermediaries and more specifically to the role of intermediary 316 in its investigations. He is also able to speak on general matters related to the recruitment of intermediary 143 and aspects of his work for the OTP.
13. [REDACTED], DRC-OTP-WWWW-0581, is being called solely and specifically to speak about his meetings and communications with intermediary 321 in the field during November/December 2007. Because of unique security issues that arose at the time, [REDACTED] provided assistance in connection with the intermediary and witnesses that exceeded his usual functions. As a witness, he is expected to provide evidence of the facilitation, work and involvement of intermediary 321 in bringing the specific former child soldiers to the OTP during that time. He is not being called to give evidence on matters related to other intermediaries, other witnesses unrelated the abuse of process issue or trial witnesses unconnected to intermediary 321.
14. Following on from its submissions during the status conference on 10 June 2010,¹¹ the Prosecution submits that Defence questioning of the three witnesses should be limited to the strict parameters as defined above. In line with the principles articulated by the Single Judge in the Abu Garda case and Trial Chamber II in Katanga,¹² the questioning by the Defence must be limited to the matters for which the witnesses are being called. It should not be an opportunity for the Defence to commence a “fishing expedition”, including, for example, to ask questions generally aimed at eliciting confidential or protected work product information regarding internal processes of the OTP.

The Prosecution would further note that two of the witnesses are no longer

¹¹ See transcript of the hearing on 10 June 2010, ICC-01/04-01/06-T-299-ENG ET, page 7, line 9 to page 13, line 7.

¹² “Decision on witness to be called by the Defence at the confirmation hearing”; ICC-02/05-02/09-186. In its “Décision sur la requête de la Défense de Mathieu Ngudjolo en vue de reporter la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve)”, ICC-01/04-01/07-1603, Trial Chamber II also set clear boundaries on the evidence for which the OTP representative was being called, and stipulated that “there can be no question of addressing the situation of a particular witness, still less of challenging decisions ordering redactions pursuant to article 54(3)(e) of the Statute or to rule 81 of the Rules”; ICC-01/04-01/07-1603-tENG, para. 19.

OTP employees, they will not have sufficient access or opportunity to review information pertinent to other matters, and they will not be in a position to give assuredly accurate and complete answers. Given the breadth and length of the investigation, a former member of the OTP cannot be expected to answer detailed questions without some prior indication as to the subject matter to be explored.

15. Additionally, and in line with the aforementioned decision, the witnesses should not be asked questions that attempt to elicit judgments or “evaluations of a discretionary nature (including without limitation matters or prosecutorial discretion)”.¹³ Imposing these parameters will also ensure that the Court’s time is not unnecessarily wasted by vague and immaterial lines of questioning, and that the evidence elicited from the witnesses is directly relevant for the Chamber’s assessment of the contested issues.

ADDITIONAL PROSECUTION WITNESSES

16. Additionally, the Prosecution seeks leave to call (or, in the case of one witness, re-call) a number of witnesses in order to meet the Defence abuse of process challenge. A brief description of these witnesses has previously been provided to the parties and participants, the details of which are supplemented below.
17. DRC-OTP-WWWW-0038 (‘witness 38’), who previously testified for the Prosecution, was introduced to the Prosecution via intermediary 316 and will give evidence that intermediary 316 never asked him to falsify evidence or lie to the Prosecution or the Court. The Prosecution notes that the Chamber’s preliminary view is that is the prospective evidence of witness 38 is relevant to the abuse of process issue and that he can be re-called.¹⁴
18. A further statement was taken from this witness in respect of these issues in September 2009. This was disclosed to the Defence on 25 September 2009 and

¹³ *Abu Garda, supra*, ICC-02/05-02/09-186, page 8.

¹⁴ ICC-01/04-01/06-T-299-ENG ET, page 25, lines 14-22.

is attached as Confidential Annex 3. The witness's statement adequately reflects the information the Prosecution intends to elicit in evidence. Pursuant to submissions made on 10 June 2010, the Prosecution is in the process of arranging the witness to testify via video link, should leave be granted to call the witness. Notwithstanding these preparations, the Prosecution may seek the admission of statement in its entirety, for the truth of its contents, pursuant to Rule 68 of the Rules of Procedure and Evidence (Rules).¹⁵

19. DRC-OTP-WWWW-0496, the father of trial witnesses DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0008, will provide evidence regarding the age of his children, their participation in the UPC, and alleged pressure applied by the Defence resource person and others associated with the UPC and the Accused to encourage false testimony. The Prosecution interviewed witness 496 in November 2009 and January 2010. The transcripts of these interviews were disclosed to the Defence on 4 February 2010 and are attached as Confidential Annexes 4A and 4B.
20. The witness's two statements adequately reflect the information the Prosecution intends to elicit in evidence and the Prosecution therefore requests the admission of the statements in their entirety, for the truth of their contents, pursuant to Rule 68. In the hearing on 10 June 2010, the Defence confirmed that they have no objection to the transcripts of this witness's interviews being admitted from the bar table, obviating the need for this witness to give evidence *viva voce*, and the Prosecution accordingly seeks the leave of the Court for the two statements to be admitted into evidence pursuant to Rule 68.
21. DRC-OTP-WWWW-0555 will provide evidence on the pressure and intimidation applied by Hema supporters on those suspected of involvement with the ICC. A statement of this witness was taken by the Prosecution in April 2010 but has not been disclosed. A copy is attached for the Chamber's

¹⁵ *Abu Garda, supra*, ICC-02/05-02/09-186, page 24.

information as Confidential Ex Parte Annex 5. The statement will be disclosed to the Defence as soon as the witness's personal security situation has been properly addressed, but sufficiently in advance of his testimony so that the Defence can properly prepare.

22. As the Prosecution further explores and evaluates the evidence of these and other potential witnesses, it may seek leave to call additional witnesses, including for example a witness who has been identified as a friend of trial witness DRC-OTP-WWWW-0089 and who may be able to corroborate witness 89's testimony that he served in the UPC. Therefore the Prosecution reserves its right to seek leave to call additional witnesses upon a showing of good cause. It also reserves its right to seek leave to withdraw scheduled witnesses if, on reflection, their evidence is no longer required.¹⁶

REQUEST FOR ORDER TO CALL 'CORDO' AS A WITNESS

23. In addition, the Prosecution requests that the Chamber order the Defence to call "Cordo", allegedly a cousin of the Accused who acted as a Defence intermediary, to testify prior to the submissions regarding the alleged abuse of process;¹⁷ or in the alternative that the Chamber itself call Cordo to testify pursuant to its authority under Articles 64(6)(b) and 69(3). In that event, the Chamber should instruct the Defence to provide all necessary identifying information to permit the enforcement of such an order.
24. In the Prosecution's submission, from the evidence which has emerged in this case, in which a witness has testified that Cordo attempted to persuade him to give false testimony before the court and succeeded in convincing at least two other witnesses, it should be beyond dispute that the evidence of Cordo is "necessary for the determination of the truth" within the terms of Article 69(3). In addition, this person meets the requirements set out by the Chamber

¹⁶ In this regard, the Prosecution notes that upon further assessment and taking into account the practical arrangements required to secure his testimony, the Prosecution is no longer intending to call witness DRC-OTP-WWWW-0551.

¹⁷ Article 64(6)(d).

in its recent decision on intermediaries to order the attendance of an intermediary to testify for the purposes of the abuse of process motion.¹⁸

Legal basis for the request

25. The Trial Chamber has already set out the standard which must be met for the Chamber to order that a person who assisted a party with its investigations and with locating witnesses (i.e. an “intermediary”) shall be called prior to the parties’ submissions on the Defence’s abuse of process motion: namely “that there is evidence [...] that the individual in question attempted to persuade one or more individuals to give false evidence.”¹⁹
26. As to the statutory basis of the request, the Statute authorises the Trial Chamber to “require the attendance and testimony of witnesses and production of documents and other evidence” (Article 64(6)(b)) and “order the production of evidence in addition to that [...] presented by the parties” (Article 64(6)(d)). As it has been noted, these provisions must be read jointly with the important principle enshrined in Article 69(3): the Court “shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”.²⁰
27. The Trial Chamber’s authority to order the production of supplementary evidence can be triggered proprio motu or at the request of a party or participant.²¹ For instance, in an ICTR case, the Trial Chamber ordered the Prosecution, at the request of the Defence, to take necessary steps to obtain the written confessions that three prosecution witnesses had made before the Rwandan authorities prior to their testimony. The Chamber considered that

¹⁸ ICC-01/04-01/06-2434-Red2, para. 139 (f).

¹⁹ *Ibid.*

²⁰ F. Terrier, Powers of the Trial Chamber, in: A. Cassese, The Rome Statute of the International Criminal Court: A Commentary, Vol. II, p. 1272. As noted by this author, these provisions adopt the developments of the ad hoc Tribunals, whereby judges are vested with autonomous powers for the production of evidence.

²¹ ICC-01/04-01/06-1432 OA9 OA10, paras. 95, 98-99. The Prosecution notes that there is a pending appeal in the Katanga case related to the Court’s authority to call for additional evidence upon request of the victims. See the appeal brief of the Defence for Germain Katanga (ICC-01/04-01/07-2063 OA11) against the decision on victims’ participation issued by Trial Chamber II on 22 January 2010 (ICC-01/04-01/07-1788). The Prosecution responded to the Katanga appeal brief on 14 May 2010 (ICC-01/04-01/07-2100 OA11).

the written confessions could be material in evaluating the credibility of the witnesses, and that accordingly it was necessary to order production for a “better determination” of the matters before the Chamber.²² The Prosecution submits that identical considerations apply to the instant case.

Factual basis for the request

28. Evidence in the record provides *prima facie* grounds to believe that Cordo persuaded or attempted to persuade individuals to give false evidence in Court. Since that time, witnesses have testified, under oath, that Cordo explicitly requested witnesses to lie in Court and exerted pressure over witnesses.
29. Witness DRC-OTP-WWW-0297 (“witness 297”) testified that Cordo asked him directly to deny the fact that he had been a child soldier, in order to “[REDACTED]”. He stated that Cordo told him: “[REDACTED]”²³
30. Witness 297 furthermore indicated that just before he gave his testimony, Cordo told him the following:

“[REDACTED]”²⁴
31. Witness 297 further testified that other witnesses had lied before the Court at Cordo’s request, and in particular he referred to Defence witnesses [REDACTED] and [REDACTED].²⁵
32. Defence witnesses [REDACTED], [REDACTED], denied that witness 297 had served as a child soldier for the UPC, and also denied that [REDACTED] had been a child soldier. But according to witness 297, Defence witnesses [REDACTED] testified falsely, as instructed by Cordo.

²² *The Prosecutor v. Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000. The Prosecution had resisted the motion, arguing, *inter alia*, that it was for the Defence to use the resources available to it to conduct its investigation.

²³ ICC-01/04-01/06-T-285-CONF-ENG ET, page 11, lines 10-14.

²⁴ ICC-01/04-01/06-T-288-CONF-ENG ET, page 13, lines 9-16.

²⁵ ICC-01/04-01/06-T-285-CONF-ENG ET, page 15, lines 18-21; see also ICC-01/04-01/06-T-285-CONF-ENG ET, page 33, lines 7-15.

33. Witness 297 testified that Cordo repeatedly informed the community that he was going to testify for the Prosecution. As a result, the entire community turned against him.²⁶ At a very early stage in the investigation, before witness 297 was selected as a Prosecution witness, Cordo and several other influential UPC personalities (including chief Maté, chief Nembe and chief Komanda) visited witness 297 and his parents. Cordo also visited witness 297's uncle, [REDACTED], [REDACTED]: "[REDACTED]."²⁷
34. All these events had a huge impact on witness 297, who as a result feared for his life.²⁸ Also as a result of his cooperation with the ICC, witness 297's parents rejected him and told him never to return home again.²⁹
35. Other witnesses have testified that Cordo exerted pressure on them and their families once he learned that they were collaborating with the Court. He either approached these witnesses or their relatives directly or conveyed this information to the community.
36. Defence witness 4 was originally screened as a possible Prosecution witness. However he later refused to give a statement to the Prosecution and appeared on behalf of the Defence. He admitted on cross-examination that he had been pressured by Cordo and other UPC leaders for collaborating with the ICC.³⁰
37. Defence witness 4 also testified that everyone knew about his cooperation with the ICC and the negative consequences that this would bring on him.³¹ Defence witness 4 – currently 20 years old – was also brought by Mr. Mbuna to Cordo and other UPC high officials in the UPC Offices.³² During this

²⁶ ICC-01/04-01/06-T-285-CONF-ENG ET, page 12, lines 15-21.

²⁷ ICC-01/04-01/06-T-288-CONF-ENG ET, page 7, lines 15-18.

²⁸ ICC-01/04-01/06-T-285-CONF-ENG ET, page 20, lines 21-25.

²⁹ ICC-01/04-01/06-T-288-CONF-ENG ET, page 10, lines 17-25 and page 11, lines 1-8. In addition, and because of the risks involved, witness 297's parents also refused to give him photographs that establish his membership in the UPC. See ICC-01/04-01/06-T-291-CONF-ENG ET, page 38, lines 8-21. Furthermore, and in respect of his schooling documents, witness 297 said: "[REDACTED]." ICC-01/04-01/06-T-289-CONF-ENG ET, page 17, lines 9-12.

³⁰ Although the witness tried to justify the pressure he received by suggesting that it was due to the fact that he had initially lied to the OTP; ICC-01/04-01/06-T-245-CONF-ENG, page 41, lines 22-25.

³¹ ICC-01/04-01/06-T-242-CONF-ENG, page 12, lines 20-24.

³² ICC-01/04-01/06-T-245-CONF-ENG, page 43, lines 1-2.

meeting, he was told the following: “[REDACTED].”³³ He stated that Mr. Mbuna told him: “[REDACTED].”³⁴

38. Witness DRC-OTP-WWW-0213 (‘witness 213’), “[REDACTED]”³⁵ has provided information corroborating the testimony of witness 297: that Cordo and others threatened him and his family, and continue to do so. In addition, he has indicated that Defence witness 4 was urged by Cordo and Chief Mateso to come to the Court to contradict witness 213’s testimony, and that intermediary 321 was attacked by Chief Mateso when he (intermediary 321) came to transfer witness 213 to interviews and to relocate him into the Court’s protection program.³⁶

Analysis

39. In light of the foregoing, and based on its own prior decision, the Chamber should order the Defence to call Cordo, or in the alternative, the Chamber should call him itself under the authority set out in Articles 69(3) and 64(6)(b) and (d).
40. The Prosecution acknowledges that it previously asked the Chamber to order the Defence to disclose Cordo’s identity so that it could conduct its own investigations,³⁷ a request the Chamber recently denied.³⁸ However, the present request is different. First, this request seeks a different remedy that is intrinsically linked to the Court’s responsibility to discover the truth: rather than seeking disclosure from the Defence, the Prosecution asks the Chamber to exercise its power to order the Defence to call a person who clearly acted as one of its intermediaries as a witness, or to call that person as a witness itself.

³³ ICC-01/04-01/06-T-245-CONF-ENG, page 35, lines 11-12.

³⁴ ICC-01/04-01/06-T-245-CONF-ENG, page 35, lines 17-20.

³⁵ Notice of this interview was provided to the Trial Chamber and Defence by email on 8 June 2010 at 14:17hrs.

³⁶ The recordings and transcripts of this interview will be registered and disclosed forthwith upon completion of the interview.

³⁷ The Prosecution also notes that while at the time of its prior application for disclosure of the identity of Cordo, the Defence has indicated that it was not in a position to determine the identity of the individual, since that time witness 297 has provided substantial additional details which would enable the Defence to identify Cordo with sufficient certainty (see ICC-01/04-01/06-2396-Red, para. 9).

³⁸ ICC-01/04-01/06-T-297-CONF-ENG ET, page 33, line 23 to page 42, line 20.

The Chamber has already set out the standard for making such an order, and that standard it is amply met in this case. Second, the previous request was made before it was established that the Prosecution would be required to call its intermediaries and the persons within the office who interacted with them; the evidence of intermediaries now being specifically required to determine if the evidence presented by the Prosecution was false, it is fitting to require that intermediaries on the Defence side also be examined to determine if the abuse of process claim is predicated upon false evidence. And finally, this request is based on critical new factual allegations that have surfaced in Court and that suggest that Cordo influenced the testimony of Defence witnesses and attempted to influence an anticipated Prosecution witness's testimony.³⁹

41. The Prosecution further notes this application does not infringe on the accused's right to silence or privilege against self-incrimination are raised by this application. The testimony of Cordo is not sought regarding the liability of Thomas Lubanga for the crimes charged.⁴⁰ Rather, the testimony of this individual is required in order to fully assess the factual basis of the affirmative case raised by the Defence – abuse of process by the Prosecution in its use of intermediaries – as well as to assess the credibility of the witnesses the Defence has already called.⁴¹
42. The Defence has squarely placed the conduct of intermediaries in issue. Their alleged impact on the reliability of the in-court testimony is a critical underpinning of the proposed motion for abuse of process. Moreover, the allegations that the Prosecution's witnesses lied at trial are based on the contrary testimony presented by Defence witnesses -- this is, in essence, a credibility contest between competing versions. The Defence theory is that its

³⁹ See para. 28 above.

⁴⁰ A contrario, ICC-01/04-01/06-T-292-CONF-ENG ET, page 39, line 25 to page 40, line 9; page 41, lines 20-25; page 42, lines 1-20 (closed session).

⁴¹ The rationale behind the Chamber's order for the testimony of Prosecution intermediaries applies in the instant case. See ICC-01/04-01/06-2434-Red2, para. 141. The Chamber ordered the testimony of two prosecution intermediaries as it would assist the Chamber to resolve "first, the criticisms that have been leveled against them; second, some of the extensive conflicts in the evidence that have emerged during the trial; and, third, the possible contacts between intermediaries".

witnesses are truthful and the Prosecution witnesses lied with the connivance of intermediaries acting on behalf of the Prosecution. It is essential to the Court's evaluation of the truth in this case to know if the Defence witnesses, on whose testimony this theory is based, themselves lied at trial through the connivance of Defence intermediaries. And indeed, the evidence identified above provides ample justification for the Court to explore these issues in its paramount responsibility to discover the truth.

43. The Chamber should fully explore the issues as part of its obligation to provide a fair proceeding. If the Trial Chamber were to find abuse of process sufficient to require dismissal of the charges without hearing the evidence from the Defence intermediary who allegedly procured false testimony in support of that Defence, the decision would be reached on an incomplete and one-sided evidentiary basis. Moreover, fairness requires that the Accused cannot, in his affirmative Defence, impugn the conduct of Prosecution intermediaries, requiring their attendance at trial, while at the same time shielding from scrutiny his own intermediaries and their impact on the very evidence upon which the Defence relies.⁴²

Relief Requested

44. Based on the foregoing, the Prosecution requests the Trial Chamber to:
 - (a) Order the questioning by the Defence of OTP representatives to be limited and confined within appropriate parameters to the matters set out above;
 - (b) Grant leave to the Prosecution to call witnesses 38 and 555;
 - (c) Admit into evidence the statements of witness 496; and

⁴² If the Defence claims that it is still unable to identify Cordo – who has been described as the Accused's cousin -- or if Cordo declines to testify, the Prosecution will present further submissions on the impact that this should have on the Chamber's assessment of the evidence which the Defence has brought in support of its claim of abuse of process.

- (d) Call as a court witness a purported cousin of the Accused, a person known only as "Cordo", or order the Defence to call Cordo as a witness.



Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of June 2010
At The Hague, The Netherlands